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Note

Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts

by
ROCHELLE A. SMITH*

[T]he law of trusts is living law.

- Austin Wakeman Scott¹

America is in the midst of a "nonprobate revolution."² The goal of most estate planning is to provide for the quickest, most private, least expensive, uncontested distribution of assets possible.³ Viewed as repugnant to these goals, probate, the judicial process that validates an instrument as a decedent's last will⁴ and governs estate administration,⁵ has

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1. 1 AUSTIN W. SCOTT & WILLIAM F. FRATCHER, SCOTT ON TRUSTS at xxv (4th ed. 1987).

2. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108 (1984). Professor Langbein asserts that over the course of the twentieth century, persistent tides of change have been lapping at the once-quiet shores of the law of succession. Probate, our court-operated system for transferring wealth at death, is declining in importance. Institutions that administer non-court modes of transfer are displacing the probate system.

Id.

3. GEORGE M. TURNER, REVOCABLE TRUSTS 1-2 (1983). Mr. Turner identifies seven goals in estate planning: minimizing the cost, time, complexity, total tax liability, and likelihood of contests involved in estate settlement while maximizing family privacy and providing adequate management and control both during the lifetime and after the death of either or both spouses. *Id.*

4. PAUL G. HASKELL, PREFACE TO WILLS, TRUSTS AND ADMINISTRATION 169 (1987).

5. Professor Langbein explains:

The term "probate" originally applied only to the proceedings used to prove (probare) a will; it stood in contrast to "administration," which comprehended all subsequent proceedings winding up the estate. In modern American usage, "probate" embraces "administration" and hence extends to the administration of both testate and intestate estates.

become the object of widespread public discontent.⁶ Because the probate process can be expensive,⁷ expose private family matters to the public,⁸ take years to conclude,⁹ and cause families trauma and anxiety,¹⁰ more

Langbein, *supra* note 2, at 1108 n.1 (citing MAX RHEINSTEIN & MARY ANN GLENDON, *THE LAW OF DECEDENTS' ESTATES* 478 (1971)).

6. Professor Langbein writes, "As long as probate reform still calls for probate, it will not go far enough for the tastes of many transferors." *Id.* at 1116-17. See also TURNER, *supra* note 3, at 11 ("There is probably no area in the practice of law which raises more unsavory comments from the public than that of the probate system.").

In 1965 Norman Dacey's do-it-yourself living trust manual, *How to Avoid Probate*, reached number two on the New York Times best-seller list (second to Masters & Johnson's *Human Sexuality*). NORMAN DACEY, *HOW TO AVOID PROBATE* 1 (rev. ed. 1990). Now in its *New Edition for the 1990's*, the continued popularity of *How to Avoid Probate* attests to public discontent with probate. Mr. Dacey estimates that over 12.5 million trusts have been established using the tear-out trust instruments provided in his manual. *Id.* at 6.

7. See TURNER, *supra* note 3, at 11-14 (stating that in addition to fees and expenses of the state inheritance tax appraiser, charges for accountants, court fees, and the possible expense of retaining other professionals such as private appraisers, the area of "greatest expense is that of fees paid to personal representatives and attorneys"). Mr. Turner listed seventeen "common areas in which extraordinary fees are regularly allowed." *Id.* at 1-2 (1990 Supp.). A small sampling of such common legal services that may warrant "extraordinary" fees and commissions to an executor or attorney include sales or mortgages of real or personal property, preparation of estate, inheritance, income, sales, or other tax returns, carrying on or winding up the business of the decedent, cancellation of leases, petitions for instructions, determination of title holdings, and evaluation procedures for valuation of property. *Id.* See also E. WILLIAM CARR, *REVOCABLE TRUSTS* 38, 43 (1980) ("A revocable trust saves probate expenses because at the settlor's death the property in the trust is not subject to the executor's commissions and attorney's fee." The trustor also avoids other probate expenses such as court costs and appraisers' fees.).

8. TURNER, *supra* note 3, at 6-7. Mr. Turner contrasts the "near-obscene" newspaper accounts of the disposition of Natalie Wood's estate with the low-key coverage of Bing Crosby's estate disposition. Whereas at probate Wood's will became a matter of public record enabling reporters to expose every provision in gruesome detail, Crosby disposed of his entire estate through a trust. Thus, the press was unable to ascertain the size or distribution of the estate. Mr. Turner quotes Crosby's attorney referring to the trust as "a private will." *Id.* at 7. See also *Estate of Hearst*, 67 Cal. App. 3d 777, 783-84, 136 Cal. Rptr. 821, 824 (1977). Holding that it had no statutory or inherent authority to prohibit public access to probate files, the court denied a petition to seal the probate files of William Randolph Hearst's will despite evidence that members of the Hearst family would be endangered if their names (some changed by marriage) and addresses became public. *Id.* The court explained that testators "can eschew court-regulated devices for transmission of inherited wealth and rely on private arrangements such as inter vivos gifts, joint tenancies and so-called 'living' or grantor trusts." *Id.*

9. TURNER, *supra* note 3, at 5 (stating that even a simple will may take from two to four years to probate).

10. Mr. Turner posits:

The length of time for settling the estate is often as physiologically and psychologically devastating to a family as is the cost imposed by taxation. There appears to be a direct correlation between the length of time it takes to settle an estate and the anxiety and stress level experienced by the family.

Id.

and more estate planners are counseling clients to avoid probate by using will substitutes instead of wills to distribute the bulk of their estates.¹¹

Will substitutes are instruments that simulate wills by allowing a donor to pass property at her death while retaining control over the property during her life.¹² Will substitutes include pension plans, life insurance policies, and joint accounts,¹³ but perhaps the most versatile is the revocable living trust.¹⁴ Also known as an "inter vivos trust," a "revocable living trust"¹⁵ refers to a trust that a trustor creates during her lifetime and that the trustor may modify or revoke at any time until her death.¹⁶ Using a revocable living trust, a donor may name herself as the immediate beneficiary to enjoy substantial lifetime control over her wealth and also specify a remainder beneficiary to receive the trust corpus at her death.¹⁷ In contrast to most other will substitutes, the revocable living trust is not asset specific; thus, like a will, a revocable living trust can be used to pass a wide variety of assets upon a donor's death.¹⁸

The chief reason for replacing wills with revocable living trusts, as well as other will substitutes, is to avoid probate.¹⁹ Revocable living trusts "pass [property] in accordance with their terms . . . and are not subject to estate administration."²⁰ The trustee designated in the trust usually manages the assets without court supervision.²¹ In other words, revocable living trusts avoid the delay, publicity, and expense that accompany a court proceeding.²² Additionally, revocable living trusts and other will substitutes may be created without observing the strict testa-

11. *Id.* at 7-10; CARR, *supra* note 7, at 5, 22; JOHN R. COHAN & GERALDINE S. HEMMERLING, INTER VIVOS TRUSTS 88 (1975); DACEY, *supra* note 6, at 23-36, 41-47; JAMES F. FARR & JACKSON W. WRIGHT, JR., AN ESTATE PLANNER'S HANDBOOK 75-83 (4th ed. 1979); HAROLD WEINSTOCK, PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES 142 (3d ed. 1988); Langbein, *supra* note 2, at 1108, 1113.

12. Langbein, *supra* note 2, at 1109.

13. *Id.* Professor Langbein identifies four will substitutes that "constitute the core of the nonprobate system: life insurance, pension accounts, joint accounts, and revocable trusts. When properly created, each is functionally indistinguishable from a will." *Id.*

14. See *infra* note 18 and accompanying text.

15. "[A] revocable living trust and an inter vivos trust are basically the same term with one being the English form and the second being the Latin form." TURNER, *supra* note 3, at 4.

16. COHAN & HEMMERLING, *supra* note 11, at 80.

17. CARR, *supra* note 7, at 22.

18. Langbein, *supra* note 2, at 1115 n.32 ("Revocable inter vivos trusts need not be asset-specific; they can apply, as broadly as a will, to any and all forms of property.").

19. Langbein, *supra* note 2, at 1115-16. "The probate system has earned a lamentable reputation for expense, delay, clumsiness, makework, and worse." *Id.* at 1116.

20. HASKELL, *supra* note 4, at 162. Professor Haskell explains that "[w]ill substitutes pass free of the regulation to which estate assets are subject. There is no rhyme or reason for this difference in treatment; . . . the dichotomization of the economic estate evolved without design." *Id.*

21. *Id.*; COHAN & HEMMERLING, *supra* note 11, at 91-92.

22. See *supra* notes 7-10 and accompanying text.

mentary formalities required of wills.²³ A will may be declared invalid if it is not executed and witnessed in strict compliance with state statutes,²⁴ but there are numerous relatively simple ways to establish a trust.²⁵ Thus, because of their versatility and the fact that they can be created and implemented with ease and efficiency free of probate, revocable living trusts have become a popular will substitute.²⁶

However, by electing to use a revocable living trust the unwary trustor ultimately may not achieve the distribution she intended. In California, if a trust beneficiary dies before the trustor and the trustor neglects to revoke the trust or name an alternative beneficiary, the funds intended for the beneficiary (now deceased) pass not according to the trustor's will, but rather according to the beneficiary's will (or to the beneficiary's intestate heirs if there is no will).²⁷ Unfortunately, distribution under the predeceased beneficiary's will may be contrary to the wishes of the trustor; assets may pass to persons that the trustor does not know or like, or even to the beneficiary's creditors.²⁸

While at first this may appear to be a trivial problem (after all, someone is benefitting), one goal of trust law is to carry out the intent of the trustor.²⁹ It is not unreasonable to assume that the average trustor

23. HASKELL, *supra* note 4, at 127; Langbein, *supra* note 2, at 1115.

24. See 2 WILLIAM PAGE, PAGE ON THE LAW OF WILLS § 19.4, at 63-65 (William J. Bowe & Douglas H. Parker eds., 1960).

25. HASKELL, *supra* note 4, at 69-71. California Probate Code section 15200 provides: [A] trust may be created by any of the following methods:

- (a) A declaration by the owner of property that the owner holds the property as trustee.
- (b) A transfer of property by the owner during the owner's lifetime to another person as trustee.
- (c) A testamentary transfer of property by the owner to another person as trustee.
- (d) An exercise of a power of appointment to another person as trustee.
- (e) An enforceable promise to create a trust.

CAL. PROB. CODE § 15200 (West 1991).

26. See *supra* text accompanying notes 17-25.

27. See, e.g., *Randall v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 48 Cal. App. 2d 249, 255, 119 P.2d 754, 757 (1941) (A trustor gave a remainder interest to his grand-nephew who failed to survive the trustor. At the trustor's death, the grand-nephew's wife took the interest as the grand-nephew's sole heir.).

28. Even if the predeceased beneficiary had designated a residuary taker, creditors are satisfied before the "residue" is determined; "a residue does not exist as long as there are debts which are unpaid, or other legacies which are unsatisfied." 6 PAGE, *supra* note 24, § 50.16 at 95. Further, if the predeceased beneficiary neglected to dispose of the residue of his estate, then the remainder interest would become part of the intestate estate. Creditors are satisfied first out of the intestate estate. CAL. PROB. CODE §§ 21401-21402 (West 1991).

29. Trusts originally were created in order to avoid rules of law and enable trustors to pass property as they saw fit. See *infra* notes 114-117 and accompanying text. Today, trust law still operates to fulfill the intent of the trustor. This is best exemplified by section 15203 of the California Probate Code which allows a trustor to create a trust "for any purpose that is not illegal or against public policy." CAL. PROB. CODE § 15203 (West 1991). See also *infra*

names a remainder beneficiary with the expectation that this beneficiary will outlive her and enjoy possession of the property. Of course, a beneficiary who survives the trustor ultimately may pass the property to whomever she pleases regardless of whether the trustor would approve of her choice.³⁰ However, in the event that the beneficiary predeceases the trustor and never enjoys possession of the property, the trustor likely would want to redirect to whom the trust property would pass.³¹ Moreover, it would be ironic if, upon the trustor's death, the trust corpus ended up in probate under the beneficiary's will.

These undesirable consequences could be avoided through careful planning. To ensure that a remainder interest passes to a preferred individual, the trustor could condition the interest on the beneficiary's survival and name alternate beneficiaries to take the interest in the event that the first beneficiary fails to survive.³² Hence, if beneficiary A predeceased the trustor, her interest would fail and immediately pass to beneficiary B, the alternate. In addition, were a beneficiary to die unexpectedly, the trustor has the power to modify the trust and name a different beneficiary or revoke the trust entirely.³³ However, trustors do not always anticipate untimely deaths nor do they always review their estate plan immediately upon the demise of a loved one.³⁴ Thus, if imple-

notes 100-102 and accompanying text (discussing several recently enacted statutes designed to give the trustor expansive control over revocable trust assets).

30. Once the beneficiary takes the interest in fee simple he may transfer or devise it to whomever he pleases. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 23 (2d ed. 1984).

31. See Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 327 (1988). Professor Roberts addresses a similar issue in the context of wills and antilapse legislation:

If the devisee survives the testator even by one month, the property goes to his estate. Why, then, should the failure to survive the testator be of such critical importance? The testator's death, however, is not such an arbitrary point in time if the premise is accepted that the testator probably would not want to benefit the successors-in-interest of every devisee who fails to live long enough to enjoy the gift.

Id.

32. In other words, the trust provision would read, "to A if he survives me; if A fails to survive, then to B." See HASKELL, *supra* note 4, at 311-12 (providing an example of a revocable living trust document in which the beneficiary's interest is conditioned upon his survival and alternative beneficiaries are named in the event that the first named beneficiary fails to survive).

33. The California Probate Code provides that "[u]nless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor." CAL. PROB. CODE § 15400 (West 1991). Further, sections 15401 and 15402 allow the trustor to revoke or modify the trust in whole or in part "[b]y compliance with any method of revocation provided in the trust instrument" or "[b]y a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor." CAL. PROB. CODE §§ 15401-15402 (West 1991).

34. See Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 337 (1985). Professor French discusses comparable problems in the context of wills:

Proper testamentary planning and drafting to provide alternative takers can avoid

menting the trustor's intent is a priority, it is up to the legislature to enact statutes that anticipate and remedy such oversights.

In the case of wills, the legislature has enacted lapse and antilapse rules to address such oversights. Generally, if a devisee predeceases a testator and the testator has neglected to specify an alternative devisee or update the will, the devise lapses back to the testator's estate and passes to the testator's residuary devisee; if there is no residuary clause, the estate passes to the testator's heirs according to the rules of intestate succession.³⁵ However, where a devisee bears some special relationship to the testator, the law assumes that the testator would not want the gift to lapse.³⁶ Thus, antilapse rules prevent gifts³⁷ to particular people from lapsing and usually specify to whom the gift should pass (for example, to the deceased devisee's issue).³⁸ Antilapse statutes vary slightly from state to state because each state legislature must determine what the majority of testators would have intended had they anticipated a devisee's early death—which particular gifts a testator would not want to lapse and to whom the testator would prefer the gift pass.³⁹ However, despite the current use of revocable living trusts as will substitutes, trustors are not yet protected by remedial statutes such as the lapse and antilapse rules.

This Note addresses the problems created when the trustor of a revocable living trust fails to provide for the predecease of a remainder beneficiary. Specifically, this Note shows how the revocable living trust operates as a will, and examines how and why the rules dealing with predeceased beneficiaries differ between wills and trusts. The Note then proposes that because both wills and revocable living trusts serve essentially the same function, the rules governing the distribution of predeceased beneficiaries' gifts should be uniform. Trust beneficiaries' remainder interests generally should be conditioned upon surviving the trustor; if the beneficiary fails to survive the trustor, the gift should

the problem [that arises when a devisee predeceases the testator], but not all lawyers are careful drafters and not all testators consult lawyers. Furthermore, some testators are either unable or unwilling to anticipate and to provide for the eventuality that some or all of their intended beneficiaries will predecease them.

Id.

35. See *infra* notes 47-50 and accompanying text. Whenever a person dies intestate (without a will), his property passes according to the rules of intestate succession. These statutory rules specify to whom the property will pass and in what proportion. They first provide for the surviving spouse and children and then specify a preference order of distribution for other varying degrees of kin. See CAL. PROB. CODE §§ 6400-6402.5 (West 1991).

36. See *infra* notes 62-64 and accompanying text.

37. The words "gift," "devise," and "bequest" are used interchangeably throughout this Note to refer to testamentary gifts. In addition, "gift" also refers to remainder interests created using revocable living trusts.

38. See *infra* notes 64-66 and accompanying text.

39. See French, *supra* note 34, at 375.

lapse.⁴⁰ Furthermore, a savings (antilapse-type) statute paralleling the antilapse statute applied to wills should be enacted to preserve specific trust gifts. By preserving only certain gifts and specifying to whom these gifts should pass, the testator's intent can be better effectuated.

Part I of this Note reviews the origin of the lapse and antilapse rules and examines how they operate in California to benefit testators and accomplish important state policies. Part II provides a short background on the development of trust law and then explores why in many states (including California) trust remainders do not lapse and antilapse statutes are not applied. Part III analyzes the Washington Supreme Court's decision in *In re Estate of Button*⁴¹ in which the court held that the state antilapse statute applied to a remainder interest in a living trust. Finally, Part IV explains how and why California should apply "lapse" and "antilapse" rules to remainder interests in revocable living trusts and proposes possible statutes.

I. Lapse and Antilapse Rules: Their Origin and How They Currently Function in California

Traditionally, the lapse and antilapse rules that govern gifts passed by will have not been applied to remainder interests in revocable living trusts.⁴² However, two state supreme courts recently have held that so-

40. At common law the term "lapse" denoted only the situation in which an expectancy failed because the devisee became "incapable of taking under the will between the time that the will was made and the time that the testator died." PAGE, *supra* note 24, § 50.1, at 58. Because a trust creates a present equitable interest in the beneficiary, a trust interest would not lapse like an expectancy, but rather it would revert back to the trustor if the beneficiary failed to satisfy a condition (for example, a condition that he survive the trustor). See BERGIN & HASKELL, *supra* note 30, at 56-57.

However, though the metaphysical mechanics of lapse and reversion differ, the two situations lead to the same result—the gift passes to the donor instead of the beneficiary. This Note uses the term "lapse" to indicate the failure of any donee to survive the donor regardless of whether the failure technically would constitute a lapse or a reversion. Similarly, the term "antilapse" denotes the general concept of redirecting specific failed gifts.

In fact, neither California Probate Code section 6146 nor 6147, the "lapse" and "antilapse" statutes, use the terms "lapse" and "antilapse." Rather, the statutes refer only to devisees who fail to survive the testator and the persons who take in their place. See CAL. PROB. CODE §§ 6146-6147 (West 1991).

41. *In re Estate of Button*, 79 Wash. 2d 849, 490 P.2d 731 (1971).

42. See *Randall v. Bank of Am. Nat'l Trust and Sav. Ass'n*, 48 Cal. App. 2d 249, 254-55, 119 P.2d 754, 757 (1941); see also *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 516-20, 138 N.E.2d 15, 18-20 (1956) (holding that the remainder interest in a revocable living trust cannot lapse because a trust speaks from the date of its creation and the beneficiary takes a vested interest subject to defeasance only by the exercise of the power of revocation); *Zweifel v. Dougherty*, 761 S.W.2d 215, 218-19 (Mo. App. 1988) ("[The Missouri antilapse statute] relates only to wills and protects a limited class from lapse by reason of the prior death of a beneficiary named in a will before the testator. The rationale of the statute has no application to a transfer of a present interest by deed.").

cial policy necessitates extending the scope of antilapse statutes to protect these remainder interests.⁴³ To develop an understanding of the benefits of the lapse and antilapse rules, this Part reviews the common-law concept of lapse, the role of antilapse statutes in general, and the scope and function of the California antilapse statute.

A. The Definition of Lapse and Antilapse

The law of wills is built upon certain fundamental principles, one of which is that a will is ambulatory and speaks only as of the testator's death.⁴⁴ In practice this means that until a testator dies, her will has no effect, and the named beneficiaries have no legal or equitable interest but merely an expectancy.⁴⁵ Thus, due to the common-law rule that property could not be willed to a deceased person,⁴⁶ if a beneficiary failed to survive the testator and the will did not specify an alternate beneficiary,⁴⁷ the bequest was deemed ineffective and was said to "lapse."⁴⁸ This means that the bequest passed back to the testator's estate⁴⁹ and was distributed according to the residuary clause or, depending upon the circumstances, the rules of intestate succession.⁵⁰

43. *Dollar Sav. & Trust Co. v. Turner*, 39 Ohio St. 3d 182, 184-85, 529 N.E.2d 1261, 1263-64 (1988); *In re Estate of Button*, 79 Wash. 2d 849, 853-55, 490 P.2d 731, 734 (1971). The courts in both *Button* and *Dollar* recognized that, in practice, revocable living trusts are used like wills to effect a post-death transfer. *Dollar*, 39 Ohio St. 3d at 184, 529 N.E.2d at 1263 ("[U]pon the death of the settlor, the inter vivos trust was transformed into a testamentary instrument."); *Button*, 79 Wash. 2d at 854, 490 P.2d at 734 ("A gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will."). Both courts then reasoned that interpreting lapse and antilapse legislation to apply to trusts would further the intent of the legislature. *Dollar*, 39 Ohio St. 3d at 184, 529 N.E.2d at 1263; *Button*, 79 Wash. 2d at 854-55, 490 P.2d at 734 ("RCW 11.12.110 declares the policy of the law of this state, and that policy is against the lapsing of gifts to relatives of the deceased. . . . [T]here being no conflicting statutory provision, a statute covering gifts by will which would lapse in the absence of the statute, applies to gifts provided in a trust.").

44. THOMAS E. ATKINSON, *HANDBOOK ON THE LAW OF WILLS* 2 (2d ed. 1953).

45. HASKELL, *supra* note 4, at 80-85.

46. Roberts, *supra* note 31, at 324 (citing LEWIS SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 80 (2d ed. 1966)).

47. The lapse rule does not operate if the testator names an alternate devisee to take the gift in the event that the first named beneficiary fails to survive the testator. See *infra* notes 75-78 and accompanying text.

48. 6 PAGE, *supra* note 24, § 50.1, at 58. Professor Page explains that at common law [lapse] refers to a legacy or devise which would have taken effect if the testator had died the instant after he executed the will; but which fails because the devisee or legatee has, in some way, become incapable of taking under the will between the time that the will was made and the time that testator died.

Id. Professor French describes lapse as "a fairly common [problem] because there is often a considerable period of time between the execution of a will and the death of the testator, during which some of the intended beneficiaries may die." French, *supra* note 34, at 336-37.

49. ATKINSON, *supra* note 44, at 777.

50. *Id.*; see also French, *supra* note 34, at 337 ("Before the adoption of antilapse statutes,

The common-law lapse rule often produced harsh consequences that defeated the intent of the testator.⁵¹ For example, if a testator left the bulk of his estate to his child and that child predeceased the testator, the gift would lapse. Instead of passing to the testator's grandchildren (the children of the predeceased child), the gift would lapse back to the testator's estate and be distributed according to the residuary clause. A gift most likely intended to provide for the testator's issue might pass to a beneficiary already amply provided for, to a beneficiary that the testator had only intended to favor minimally, or to the testator's creditors.⁵² An undesired distribution might also occur if there were no residuary clause and the lapsed property passed through intestate succession. For example, if a testator devised property to his brothers and sisters and one sibling predeceased the testator, that sibling's share would pass not to his issue but rather according to the rules of intestate succession. This might result in one branch of the family receiving a disproportionate share of the estate.⁵³

To counter the often unintended and undesired results of the lapse rule, England and a majority of American states enacted antilapse legislation.⁵⁴ Antilapse statutes are "based upon the presumption that the testator would have made provision for certain relatives of the deceased beneficiary, if his attention had been called to the death of the beneficiary, and he had had the opportunity to make such provision."⁵⁵ In general, antilapse statutes prevent the lapsing of gifts to devisees with whom the testator has a particular familial relationship by providing for a statutorily designated substitute devisee.⁵⁶ However, there is no standard antilapse statute. Because each state has devised a rule based on its own

the death of a devisee before the death of the testator caused the property to pass under the residuary clause or, if there was no residuary clause, by intestacy.").

51. French, *supra* note 34, at 337-40 (describing several instances in which lapse frustrated the intent of the testator primarily by passing property out of a family or passing property disproportionately to different branches of a family).

52. See *supra* note 28.

53. Professor French contends that "the usual testator probably would prefer to avoid lapse when the lapsed devise would pass out of the family, or when it would pass to surviving family members in an overall distribution that resulted in substantially unequal treatment of the family branches." French, *supra* note 34, at 337-38.

54. 6 PAGE, *supra* note 24, § 50.10, at 77. See Roberts, *supra* note 31, at 324-25 n.3 (citing the antilapse statutes for each state). Currently Louisiana is the only state that has no antilapse statute. *Id.* at 324. The first antilapse statute in the United States was adopted by Massachusetts in 1783. French, *supra* note 34, at 335 n.3, 338-39.

55. 6 PAGE, *supra* note 24, § 50.10, at 77.

56. Antilapse statutes provide "a substituted devisee who is a living person and who takes in place of the deceased devisee." LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 79 (2d ed. 1966).

Professor Roberts explains that "[m]ost lapse statutes apply only to deceased devisees who are related to the testator and most substitute the issue of the deceased devisee." Roberts, *supra* note 31, at 324, 328.

notion of what the average testator would have intended, antilapse statutes vary widely in scope.

Different states have selected different key relationships as well as different substitute devisees.⁵⁷ For example, the Uniform Probate Code prevents the lapse of gifts devised to a grandparent or a lineal descendant of a grandparent of the testator.⁵⁸ This would encompass gifts devised to the testator's parents, brothers and sisters, nieces and nephews, aunts and uncles, and cousins, as well as the devisee's own children and grandchildren. If one of these particular devisees dies before the testator but is survived by issue, then the predeceased devisee's issue would inherit the gift as if she were the original devisee.⁵⁹ Under the Uniform Probate Code, the key relationship provision requires that the predeceased devisee be a grandparent or lineal descendant of a grandparent of the testator. If the key relationship exists, the statutorily designated substitute devisee will be the predeceased devisee's issue. Depending upon the scope of the particular antilapse statute, *if* the key relationship exists, and *if* there is a substitute devisee living, then the statute will operate to "save" the devise and pass it directly to the substitute devisee; if the key relationship does not exist or there is no living substitute devisee, then the devise will lapse back to the testator's estate. Thus, antilapse statutes function to carry out the presumed intent of the testator where a devisee fails to survive.

B. Lapse and Antilapse in California

Today in California, the common-law lapse rule is codified as section 6146 of the Probate Code, which provides that "[a] devisee who fails to survive the testator or until any future time required by the will does not take under the will."⁶⁰ Though the statute makes no reference to "lapse," it does impose a general requirement (comparable to the com-

57. Professor French illustrates the wide variety of antilapse statutes:

The statutes range from those covering only gifts to children of the testator to those that cover gifts to anyone. In between these two extremes, there are statutes that only apply to lineal descendants, those that apply both to lineal descendants and to siblings, those based on Uniform Probate Code § 2-605, . . . those limited to heirs of the testator, those that apply to any blood relative to the testator, one that includes the testator's spouse, lineal descendants, and collaterals within six degrees, and those that apply both to blood relatives and to relatives by affinity.

The statutes also vary as to the identity of the takers substituted for the intended beneficiary. Maryland substitutes the heirs or devisees of the predeceased taker, Iowa substitutes the heirs except for the spouse, and all other states substitute the issue. The statutes also differ in their application to void gifts, and to void class gifts.

French, *supra* note 34, at 344-45. Professor French has created a chart highlighting the differences among the various state antilapse statutes. See *id.* at 375 app.

58. UNIF. PROB. CODE § 2-605 (1992).

59. *Id.*

60. CAL. PROB. CODE § 6146 (West 1991).

mon-law rule) that the devisee outlive the testator. Thus, whereas historically lapse occurred as the unfortunate result of a common-law technicality,⁶¹ the California Legislature deliberately enacted a statutory survival requirement for devisees—in essence reproducing the common-law lapse doctrine by legislative decree. Further, whereas lawmakers initially created antilapse statutes in an effort to mitigate the undesired consequences of lapse, antilapse statutes have come to be more than merely a reaction to lapse. The California Legislature might have corrected the lapse rule by eliminating it. Instead, it chose to codify both the lapse and antilapse rules. By requiring that all devisees survive the testator and then creating specific exceptions to the rule, California uses lapse and antilapse to control which gifts will succeed and which will fail based on its determination that the probable intent of the majority of testators is to keep wealth in the family.⁶² Gifts to predeceased nonrelatives lapse back to the testator's estate and are disposed of according to the testator's residuary clause (or to her heirs), while gifts to statutorily designated predeceased relatives do not lapse but rather pass directly to the predeceased devisee's issue pursuant to the antilapse rules.

Without lapse and antilapse rules, gifts to predeceased devisees, whether relatives or nonrelatives, would pass to whomever happens to be named in the predeceased devisee's residuary clause (or to her heirs if she left no will). Were the California Legislature to abolish both the lapse and antilapse statutes, whenever a devisee failed to outlive the testator, property actually would pass twice: first from the testator to the deceased devisee's estate, and then second from the deceased devisee's estate to her residuary beneficiaries or to her heirs (or in the absence of beneficiaries or heirs, the gift would escheat to the state). Once the gift has passed out of the testator's estate and into the deceased devisee's estate, the likelihood is great that the gift would pass to a beneficiary not of the original testator's choosing.⁶³ Further, the gift would be probated twice—once through the testator's will and again through the predeceased devisee's estate. Hence, in California lapse and antilapse statutes function together to keep gifts in the immediate family and avoid double probate.

While no constructional rule can be totally effective in realizing the intent of the testator who fails to express his wishes clearly, the current California system of passing gifts directly to a predeceased devisee's issue would probably meet the approval of most testators. Children of relatives and spouses are provided for, while gifts that would pass outside of

61. See *supra* text accompanying notes 46-48.

62. "The choice of deceased devisees to whom the lapse statute applies is based on the legislature's decision as to the presumed intent of the testator." Roberts, *supra* note 31, at 327.

63. See *infra* notes 179-185 and accompanying text (pointing out the pitfalls of property passing through a deceased devisee's estate).

the family are reincorporated into the testator's estate.⁶⁴ The California antilapse statute prevents the lapse of devises to "kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator"⁶⁵ when the deceased kindred devisee is survived by issue.⁶⁶ In other words, in order for the antilapse statute to save the gift, the predeceased beneficiary must be: (a) the kindred of the testator or of the testator's surviving, deceased, or former spouse, (the key relationship) and (b) survived by issue (the statutorily designated substitute devisee). If both of

64. Professor French proposes that the antilapse statute be further refined so as to take into account the nature of the overall dispositive plan in order to distinguish the situations in which lapse would be prevented from those in which it should be permitted to occur. See French, *supra* note 34, at 371-73. Such a revision would anticipate the intent of testators even more accurately. Because the intent of the trustor is similar to the intent of the testator, any changes made to the antilapse statute for wills should be incorporated into an antilapse statute for revocable living trusts.

65. CAL. PROB. CODE § 6147 (West 1991). "[Kindred] refers to persons related by blood. In general, an adoptee is kindred of the adoptive family and not of the adoptee's natural relatives." 20 CAL. L. REVISION COMM'N, REPORT, RECOMMENDATIONS, AND STUDIES OF 1989-1990, at 1431 (1990) (citing Estate of Goulart, 22 Cal. App. 2d 808, 35 Cal. Rptr. 465 (1963)) (citation omitted). If the testator were to make a devise to a stepchild who predeceased the testator, section 6147 creates a substitute gift to the issue of the predeceased stepchild. *Id.* at 1431; Roberts, *supra* note 31, at 333 (statute applies to step-children and in-laws but not to spouses). Professor French explains the seeming anomaly that section 6147 passes property to the issue of stepchildren and in-laws but not to the issue of the testator's spouse:

If the testator made a gift to in-laws, there is no doubt that he intended to include at least some people outside his nuclear family or blood relations. If the gift is to a spouse, however, the situation is different. Empirical studies show that testators in overwhelming proportions leave their property to the surviving spouse. They do so even when they have children who are not also children of that spouse, although with lesser frequency. In this situation, if the spouse predeceases, it usually would not be the testator's intent to pass the property to the issue of the predeceased spouse rather than to the testator's own issue. Hence, there is a reluctance to include spouses within the antilapse statute's coverage.

French, *supra* note 34, at 357-58.

66. Section 6147 provides:

- (a) As used in this section, "devisee" means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator.
- (b) Subject to subdivision (c), if a devisee is dead when the will is executed, or is treated as if he or she predeceased the testator, or fails to survive the testator or until a future time required by the will, the issue of the deceased devisee take in his or her place in the manner provided in Section 240 [intestate succession]. A devisee under a class gift is a devisee for the purpose of the subdivision unless the devisee's death occurred before the execution of the will and that fact was known to the testator when the will was executed.
- (c) The issue of a deceased devisee do not take in his or her place if the will expresses a contrary intention or a substitute disposition. A requirement that the initial devisee survive for a specified period of time after the death of the testator constitutes such a contrary intention. A requirement that the initial devisee survive until a future time that is related to the probate of the will or administration of the estate of the testator constitutes such a contrary intention.

CAL. PROB. CODE § 6147 (West 1991).

these prerequisites are met, and the testator has not expressed a contrary intent, the devise will pass directly to the predeceased beneficiary's issue avoiding a second probate;⁶⁷ if not, the devise lapses back into the testator's estate.

It is essential to note that the devise does not pass under the predeceased beneficiary's will, because it is not the predeceased beneficiary's interest that the legislature seeks to protect.⁶⁸ The devise may pass only to the predeceased devisee's issue in order to protect the probable (though unstated) intent of the testator: to provide for the children of his kindred.⁶⁹ Further, the devise passes directly from the testator to the predeceased devisee's issue; the issue stand in the shoes of their parent.⁷⁰ The gift is "substitutional and direct from the testator, rather than derivative through the original legatee."⁷¹ This direct transmission is important because by passing directly to the predeceased devisee's issue, the gift is neither subject to debts other than those of the testator⁷² nor probated a second time⁷³ under the devisee's will.⁷⁴

The antilapse statute never overrides the express intent of a testator.⁷⁵ For example, if a testator anticipates the untimely death of a devisee and provides for an alternate taker, the antilapse statute would not take effect: "To my child A, but if A fails to survive me then to X, my

67. See *infra* text accompanying notes 70-74.

68. HASKELL, *supra* note 4, at 103; 6 PAGE, *supra* note 24, §§ 50.10-50.12.

69. 6 PAGE, *supra* note 24, §§ 50.10-50.12. Professor Effland illustrates how the antilapse statute operates to anticipate the testator's unexpressed intent:

A will devises property to testator's daughter Jane. Jane dies before the testator but leaves issue who survive the testator. No words in the will address what to do if the daughter predeceases. A testator who had considered such a possibility would have specified who was to take if the daughter predeceased. We can only conclude that this particular testator never considered his daughter's early death. Should the devise fail or should it go to Jane's issue? Most testators would want Jane's issue to take the devise intended for Jane and a statutory rule of construction, the anti-lapse statute, operates to reach that result.

Richard W. Effland, *Will Construction Under the Uniform Probate Code*, 63 OR. L. REV. 337, 338 n.2 (1984).

70. ATKINSON, *supra* note 44, at 777, 783.

71. *Id.*

72. *Id.* at 783.

73. *Id.*

74. Roberts, *supra* note 31, at 327. Professor Roberts explains:

[T]he basic survival requirement [that a devisee survive the testator] has practical aspects. It avoids any possible argument for the need to administer the property in the estate of the predeceased devisee, and avoids the problem that arises if the heirs or devisees of the deceased devisee also predecease the testator.

Id.

75. Roberts, *supra* note 31, at 326, 346 (citing 6 PAGE, *supra* note 24, § 50.11). Professor Roberts explains that "[i]deally, lapse statutes would never apply because the draftsmen would anticipate the possibility that the devisee might predecease the testator and alternative provisions would be made." *Id.* at 346 n.92.

favorite charity." Here, the testator has expressed her wishes by specifying an alternate taker. Therefore, even if A is survived by issue, the antilapse statute will not operate to pass the devise to them because the gift will not have failed. Similarly, the antilapse statute will not take effect if the testator expressly requires that the devisee survive—"to my child A if she survives me." Because the testator *intentionally* forces the gift to lapse in the event of A's untimely death, the antilapse statute will not operate to save it.⁷⁶ Rather, antilapse statutes operate solely as gapfilling measures,⁷⁷ anticipating the intent of the forgetful or neglectful testator who fails to provide for the possibility that her beneficiaries will not outlive her.⁷⁸

If antilapse statutes effectuate the intent of the forgetful testator, why are they not applied to revocable living trusts as well? Revocable living trusts commonly are used to pass property like a will.⁷⁹ Accordingly, the intent of the majority of trustors should be substantially similar to the intent of the majority of testators. Moreover, just as a testator may neglect to name an alternate devisee, a trustor may neglect to name an alternate remainder beneficiary. Yet, with the exception of two states, antilapse statutes are not applied to ameliorate such oversights in revocable living trusts.⁸⁰ The next Part explores this apparent anomaly.

II. Revocable Living Trusts: Their Origin and Why Antilapse Statutes Are Not Applied to Them

Like the law of wills, the law of trusts is aimed at carrying out the intent of the trustor.⁸¹ Yet, often the gapfilling legislation governing wills is not carried over to trusts. This Part summarizes the development of trust law and then examines why California courts hold that remainder interests in a living trust do not lapse and hence antilapse statutes cannot be applied.

76. Roberts, *supra* note 31, at 349.

77. Effland, *supra* note 69, at 338 n.2; *see also* CAL. PROB. CODE § 6140 (West 1991) ("(a) The intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will. (b) The rules of construction expressed in this article apply where the intention of the testator is not indicated by the will.").

78. Roberts, *supra* note 31, at 325 ("Lapse statutes are remedial measures that attempt to effectuate intent when drafters fail to anticipate lapse by expressly providing for alternative takers.").

Simply having a residuary clause would not necessarily effectuate the intent of the testator. The residuary cannot anticipate which particular devisee might happen to suffer an untimely death. In contrast, the antilapse statute passes the gift directly to the issue of the particular relative who predeceases the testator. *See supra* note 69 and accompanying text.

79. HASKELL, *supra* note 4, at 67.

80. The Ohio and Washington Supreme Courts have both held that revocable living trust interests may lapse and that the state antilapse statutes apply. *See supra* note 43.

81. *See supra* text accompanying note 29.

A. The "Peculiar Character" of Trusts

Professor Austin Wakeman Scott, author of a multi-volume treatise on trusts, attributed the "peculiar character" of the trust to "the more or less accidental circumstance that in England in the fifteenth century, and for four hundred years thereafter, there were separate courts of law and equity."⁸² Whereas a judgment at law created rights in the plaintiff, a decree in equity imposed personal duties upon the defendant.⁸³ Thus, while A might possess the legal title to property, B could appeal to the court of equity to compel A to exercise her legal rights for B's benefit.⁸⁴ Professor Scott explains how the concept of the trust continued to develop: "the courts of equity went further than merely to impose personal duties on the holder of the legal title. They gave the beneficiary an interest in the property and gave him protection in the enjoyment of that interest. The result is something unique: a double form of ownership."⁸⁵ In other words, a trustee holds legal title to a property while a beneficiary owns an equitable interest in the same property—hence, "double ownership." Eventually courts held that there could be estates in uses⁸⁶ and that equitable interests in land could descend to the holder's heirs.⁸⁷ Like a legal interest, this equitable interest is devisable, descendible, and transferrable.⁸⁸

Thus, upon the creation of a trust today, the beneficiary takes a present equitable interest. This equitable interest endows the beneficiary with certain rights against the trustee,⁸⁹ even though actual enjoyment of

82. 1 SCOTT & FRATCHER, *supra* note 1, at 3.

83. *Id.* at 3-4.

84. *Id.* at 4.

85. *Id.* Professor Scott explains that the chancellor did not at first expressly create a system of equitable ownership. Rather,

he spoke as though he were merely compelling the trustee to act in accordance with the dictates of conscience. But before the end of the fifteenth century he had held that the interest of the beneficiary would be protected against purchasers with notice of his interest, against the heir of the trustee, and against gratuitous transferees.

Id. at 5.

86. A "use" was the precursor of the modern trust. Professors Bergin and Haskell illustrate the workings of the early use:

By using the magical words "to the use of O and his heirs," O created between himself and T a relationship of trust that was deemed by the Court of Chancery to be morally binding on T. The words "to the use of O and his heirs" mean, roughly, "for the purposes of O and his heirs." Thus, T holds a legal estate in fee simple in the property subject entirely to the control of O! If T fails to carry out any instruction of O's concerning the property, O has merely to ask the Court of Chancery to order T to comply. If T disobeys the order, he may be fined or jailed for contempt.

BERGIN & HASKELL, *supra* note 30, at 82-83.

87. 1 SCOTT & FRATCHER, *supra* note 1, at 6.

88. *Id.*

89. Professor Haskell explains:

The basic characteristics of a trust are (i) the division of legal and equitable title, and

possession of the trust assets may be postponed (as is the case when a revocable living trust is used as a will substitute). Generally, each individual trust agreement defines the scope of the beneficiary's rights, but a beneficiary has the power to enforce the trust.⁹⁰ Further, the beneficiary may devise her equitable interest, or it may descend to the beneficiary's intestate heirs.⁹¹ Thus, whereas a will confers no rights until the testator dies,⁹² a trust creates an immediate interest making the beneficiary an equitable owner of the trust res.⁹³

B. The Modern Revocable Living Trust

Today numerous specialized types of trusts have evolved to serve a variety of specific functions.⁹⁴ In particular, the revocable living trust is widely used as a will substitute and has developed into a sort of will-trust hybrid.⁹⁵ "Living trust" refers to a trust created during the trustor's lifetime as opposed to a testamentary trust that is created by a will and becomes operative only at the trustor's death.⁹⁶ Using a living trust, a trustor may simulate a will by giving herself a beneficial life interest in the trust property and designating beneficiaries to receive the remainder at her death. The trustor may appoint herself as trustee and life beneficiary with broad powers over the trust income.⁹⁷

In addition, like a will, a revocable living trust may be revoked or modified for any reason and at any time before the trustor's death.⁹⁸ Thus, although the beneficiary takes a present equitable interest in the

(ii) the fiduciary responsibility of the holder of the legal title to the holder of the equitable title. The person owning absolute title to property creates the trust by a special type of transfer which separates the equitable title from the legal title and imposes fiduciary responsibility upon the legal title holder.

HASKELL, *supra* note 4, at 69.

90. *Id.* at 77.

91. LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1883, 1902 (2d ed. 1956).

92. ATKINSON, *supra* note 44, at 2.

93. HASKELL, *supra* note 4, at 69.

94. 1 SCOTT & FRATCHER, *supra* note 1, at 40.

95. See Langbein, *supra* note 2, at 1113; see also *supra* text accompanying notes 12-26.

96. HASKELL, *supra* note 4, at 69. Professor Haskell defines a testamentary trust as one created under a validly executed will of a testator. It is a property transfer that takes effect at death by virtue of judicial action admitting the will to probate. . . . [T]he formal requirements for the creation of the testamentary trust are the formal requirements for the execution of a will, and the required capacity to create a testamentary trust is the same as the capacity required for the execution of a will. The trustee and beneficiaries of the testamentary trust are legatees and devisees under the will, and the assets which are bequeathed and devised in trust are first subject to estate administration in the same fashion as assets which are bequeathed or devised absolutely.

Id. at 74.

97. HASKELL, *supra* note 4, at 81-82.

98. See CAL. PROB. CODE §§ 15400-01 (West 1991).

trust, the interest is limited in that, like the expectancy created by a will, the beneficiary's interest in the trust exists entirely at the discretion of the trustor. While in theory a beneficiary may sue to enforce the trust, in practice the beneficiary would have difficulty enforcing any rights against the trustee during the trustor's life because the trustor simply could revoke the trust and terminate the beneficiary's rights.⁹⁹ In this sense, the idea of a trust interest as a form of equitable ownership has been curtailed radically by the desire to achieve the ambulatory quality of the will.

This evolution of the revocable living trust from a traditional trust, in which the beneficiary takes an immediate equitable interest that confers genuine rights of recourse, to a will-like devise, in which the interest conferred constitutes little more than an expectancy, is reflected in recent California legislation that acknowledges the tentative nature of the remainder beneficiary's interest and limits the beneficiary's rights accordingly. Section 15800 of the Probate Code specifies that as long as the trust is revocable, "[t]he person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division. . . . The duties of the trustee are owed to the person holding the power to revoke."¹⁰⁰ Section 15801 gives the trustor and not the beneficiary "the power to consent or withhold consent . . . in any case where the consent of a beneficiary may be given or is required."¹⁰¹ Section 15802 provides that "during the time a trust is revocable . . . a notice that is to be given to a beneficiary shall be given to the person holding the power to revoke and not to the beneficiary."¹⁰² These sections, enacted in 1986, demonstrate a legislative trend toward formal recognition that the interest which a remainder beneficiary holds under a revocable living trust is extremely limited—more closely resembling an expectancy than ownership. Thus, the trust beneficiary's interest has come almost full circle, growing

99. See *supra* note 33 and accompanying text; see also Langbein, *supra* note 2, at 1127 (citing *Farkas v. Williams*, 3 Ill. App. 2d 248, 121 N.E.2d 344 (1954)).

100. CAL. PROB. CODE § 15800 (West 1991). The California Law Revision Commission commented:

This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor or other person holding the power to revoke the trust. . . . Section 15800 thus recognizes that the holder of a power of revocation is in control of the trust and should have the right to enforce the trust.

18 CAL. L. REVISION COMM'N REPORTS OF 1985, at 501, 657 (1986).

101. CAL. PROB. CODE § 15801 (West 1991). Section 15801 "recognizes the principle that the consent of the beneficiary of a revocable trust should not have any effect during the time that the trust is presently revocable, since the power over the trust is held by the settlor or other person holding the power to revoke." 18 CAL. L. REVISION COMM'N, *supra* note 100, at 1775.

102. CAL. PROB. CODE § 15802 (West 1991). "[S]ection [15802] recognizes that notice to the beneficiary of a revocable trust would be an idle act in the case of a revocable trust since the beneficiary is powerless to act." 18 CAL. L. REV. COMM'N, *supra* note 100, at 658-59.

from a moral obligation to complete equitable ownership, and then, in the form of the revocable living trust, waning back toward a largely nominal interest.

C. Applying Antilapse to Revocable Living Trusts: The Vesting Dilemma

Though in practice a revocable living trust endows the remainder beneficiary with an extremely tenuous interest, it is this limited equitable interest that prevents the lapse and antilapse rules from operating. In *Randall v. Bank of America National Trust & Savings Ass'n*,¹⁰³ the California Supreme Court held that a gift to a remainder beneficiary was a vested remainder and that the interest was indefeasible unless the trustor revoked the trust.¹⁰⁴ In *Randall*, the trustor, Ward, created a revocable living trust giving himself a life estate and directing that upon his death the trust corpus should pass to Randall. Randall died six months before Ward, leaving his wife as his sole heir at law. Because Randall's remainder interest in Ward's trust was a devisable interest which vested immediately upon the creation of the trust, and because upon Randall's death his entire estate passed to his wife, upon Ward's death the trust corpus passed to Randall's wife as heir to Randall's remainder interest.¹⁰⁵

The *Randall* court recognized that there exists a constructive preference to consider remainders to be "vested."¹⁰⁶ Further, the term "vested" has been construed to preclude any implied conditions of survivorship.¹⁰⁷ Thus, absent an express survival condition, a remainder beneficiary need not survive the trustor. Consequently, death did not divest the beneficiary, Randall, of his interest.¹⁰⁸ Early vesting precluded "lapse," so that even when the beneficiary predeceased the trustor, his equitable interest survived and passed according to the beneficiary's will or to his intestate heirs.¹⁰⁹

103. 48 Cal. App. 2d 249, 119 P.2d 754 (1941).

104. *Id.* at 255, 119 P.2d at 757.

105. *See id.* at 254-55, 119 P.2d at 757.

106. *Id.* at 255, 119 P.2d at 757 (citing *Gray v. Union Trust Co.*, 171 Cal. 637, 642-43, 154 P. 306, 309 (1915)); *Miller v. Oliver*, 54 Cal. App. 495, 498, 202 P. 168, 169 (1921); *In re De Vries*, 17 Cal. App. 184, 190, 119 P. 109, 112 (1911).

107. *SIMES*, *supra* note 56, § 91. *See also Randall*, 48 Cal. App. 2d at 255, 119 P.2d at 757. Though the decision is sparse, the court in *Randall* interpreted "shall vest" as designating an interest not subject to any condition of survival. Specifically, the court wrote that "the words 'shall vest' . . . support[] the existence of a vested remainder even though enjoyment is postponed and even though the power of revocation or substitution might divest the beneficiary at any time of the right to possession which *otherwise* would upon the trustor's death pass to him." *Id.* (emphasis added). The word "otherwise" seems to indicate that the court deemed "vesting" to preclude an implied survival condition. In fact, the court never considered implying such a condition.

108. *Randall*, 48 Cal. App. 2d at 255, 119 P.2d at 757.

109. *See id.* at 255, 119 P.2d at 757 ("Upon the death of Ward [the trustor] the vested remainder in interest of Randall [the remainder beneficiary] passed to his wife as his sole heir, and her right to enforce the trust followed.").

The court acknowledged that, like an expectancy under a will, the remainder's vested interest in a revocable living trust is subject to revocation or modification at any time and for any reason as long as the trustor is alive.¹¹⁰ In essence, the will and the living trust accomplish the same task, and the testator and trustor manifest similar intent. Furthermore, the California Legislature has determined the majority of testators' intent and given it effect in the antilapse statute.¹¹¹ But despite the similarity between the intent of the testator and that of the trustor of a revocable living trust, the *Randall* court treated the trust remainder interest differently because it was "vested."¹¹² Unlike a will, the probable intent of the neglectful trustor is not considered. Thus, under the current California interpretation, vesting would appear to present an insurmountable roadblock to applying an antilapse statute to revocable living trust remainders.

III. Vesting and Other Dilemmas Revisited: An Alternative Perspective

Professor Scott described the trust as "a great instrument of law reform."¹¹³ He pointed out that historically, equity was "a far more flexible system than that of legal ownership. Uses were created for the very purpose of obtaining this flexibility and avoiding the application of the rules of law."¹¹⁴ Where the chancellors determined that a rule of law merely served to further an unsound or obsolete policy, they used the trust to circumvent that rule.¹¹⁵ Thus, uses, or trusts, accomplished "law reform" in that "[e]quity refused to follow the technical legal rules governing the creation of estates. These rules rested upon feudal conceptions that, although they still flourished in the courts of law, were no longer required by public policy."¹¹⁶ Sound rules that promoted desired social policy were retained while obsolete rules could be discarded as inapplicable to trusts.¹¹⁷

110. *Id.* Because the law prefers vested remainders over contingent remainders, the trust beneficiary's interest is said to be a vested remainder subject to being defeased—or in other words, vested unless the trustor revokes or modifies the trust. *Id.*

111. See *supra* note 62 and accompanying text.

112. If Ward had devised the property to Randall, then upon Randall's untimely death the gift would have lapsed back to Ward's estate because Randall was not survived by issue. If Ward had devised the property to Randall and Randall had left surviving issue, then the antilapse statute would have saved the gift and distributed it to Randall's issue regardless of who Randall named as residuary devisee in his will. See 6 PAGE, *supra* note 24, §§ 50.2, 50.12.

113. 1 SCOTT & FRATCHER, *supra* note 1, at 7.

114. *Id.* at 6-7.

115. *Id.* at 7.

116. *Id.* at 16.

117. While it was determined that a trust could not be used to evade a creditor or secure a monopoly to suppress competition, a trust could be used to avoid the feudal claims of an

Today, many legal scholars appear to have forgotten the very flexibility that made trusts the "great instrument of law reform." Instead of considering furtherance of sound social policy, which was the original role of the trust, these scholars place overriding emphasis upon the "technical legal rules governing the creation of estates."¹¹⁸ Lapse and antilapse statutes are not applied to revocable living trusts because historically there has been a constructional preference for vested remainders; older definitions of "vested" require that there be no implied condition of survivorship.¹¹⁹ In other words, regardless of whether there is a sound policy reason for applying lapse and antilapse to revocable living trusts, a historically based technical rule prohibits lapse. This Part examines how one court held that because the goals of the trustor and the testator are the same, the same state policy governing gifts by will should apply to gifts by trust.

A. The Example of Washington State

In 1971, the Washington Supreme Court in *In Re Estate of Button*¹²⁰ broke new ground when it held that the state antilapse statute applied to save a remainder beneficiary's gift under a revocable living trust.¹²¹ The case involved a revocable living trust established by Robert Button in 1940. The trust instrument read in part:

Upon the death of the Trustor without having withdrawn the entire fund, the balance of investments and cash remaining in the trust fund shall be delivered to the Trustor's mother, Audrey A. Burg, and her receipt for the residue of said trust fund shall thereupon release the Trustee from any further responsibility therefor.¹²²

No alternate disposition of the trust property was made in the event that Mrs. Burg should predecease her son.¹²³ Mrs. Burg died intestate on November 15, 1966, predeceasing Robert Button who died only 13 days later without revoking or modifying the trust.¹²⁴ Thus, the primary question before the court was "the proper disposition of the trust property, the only named beneficiary of the 1940 trust (other than the trustor himself) having died prior to the death of the trustor."¹²⁵

The court ruled that the state antilapse statute operated to save the predeceased beneficiary's interest. Accordingly, the court awarded the

overlord or to dispose of land by devise (at a time when land was not devisable) because these purposes were no longer contrary to public policy. *Id.* at 7-8.

118. See *supra* text accompanying note 116.

119. See *supra* notes 106-109 and accompanying text.

120. 79 Wash. 2d 849, 490 P.2d 731 (1971).

121. *Button*, 79 Wash. 2d at 855, 490 P.2d at 734.

122. *Id.* at 850, 490 P.2d at 732.

123. *Id.*

124. *Id.* at 851, 490 P.2d at 732.

125. *Id.* at 853, 490 P.2d at 734.

trust property to the descendants of Audrey Burg.¹²⁶ In reaching its conclusion, the court determined that "a gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will."¹²⁷ It then declared that the Washington antilapse statute, which on its face applied only to wills, embodied a state policy "against the lapsing of gifts to relatives of the deceased."¹²⁸ Thus, having decided that an intervivos revocable trust serves the same basic function as a will, the court held that because there was "no conflicting statutory provision, a statute covering gifts by will that would lapse in the absence of the statute, applies to gifts provided in a trust."¹²⁹

In contrast to the California court in *Randall*,¹³⁰ the Washington court declined to address whether the gift was vested,¹³¹ stating that, "Whether or not the interest of Audrey A. Burg [the remainder beneficiary] had vested prior to the death of the trustor, it was subject to be divested if she died before the trustor died."¹³² To enforce the state policy set forth in the antilapse statute,¹³³ the court simply imposed upon the remainder a condition that she survive the trustor in order to take the gift.¹³⁴ In other words, regardless of when the remainder's interest comes into being or whether it is vested, the interest is conditioned on the

126. *Id.* at 855, 490 P.2d at 735. One critic characterized the *Button* decision as "a needless public policy snipe hunt," conjecturing that the court could have reached the same result by applying future interest law. Note, *Inter Vivos Trusts—The Washington Testamentary Antilapse Statute Applied to an Inter Vivos Trust*. In re *Estate of Button*, 79 Wash. 2d 849, 490 P.2d 731 (1971), 47 WASH. L. REV. 743, 749 (1972). That the award would have been the same without resorting to use of the antilapse statute seems to strengthen the idea that *Button* was more than a shortsighted, result-oriented decision.

127. *Button*, 79 Wash. 2d at 854, 490 P.2d at 734. The court reasoned that if the bequest had been made by testamentary trust, the antilapse statute would have affected it, and "the only difference between such a gift and that involved here is that the inter vivos trust disposes of property upon the death of the settlor without the necessity of complying with the statute of wills." *Id.* But see *infra* text accompanying note 141.

128. *Button*, 79 Wash. 2d at 854, 490 P.2d at 734. The court stated that the Washington antilapse statute "declares the policy of the law of this state, and that policy is against the lapsing of gifts to relatives of the deceased. This does not mean that a testator or trustor cannot provide for a different disposition. If he does, of course, the statute has no application." *Id.*

129. *Id.* at 855, 490 P.2d at 734.

130. See *supra* notes 103-104 and accompanying text.

131. The court of appeals had decided that Mrs. Burg's interest was vested and that there could be no condition that she survive Robert Button. In re *Estate of Button*, 4 Wash. App. 773, 775, 483 P.2d 1290, 1292 (1971). The supreme court disagreed with this analysis: "We do not examine the propriety of the conclusion that [Audrey Burg's] interest had vested, since we are of the opinion that that conclusion does not answer the question whether that interest was intended to pass to her heirs upon her death." 79 Wash. 2d at 855, 490 P.2d at 734.

132. *Button*, 79 Wash. 2d at 855, 490 P.2d at 735.

133. See *supra* note 128 and accompanying text.

134. *Button*, 79 Wash. 2d at 855, 490 P.2d at 735.

remainder surviving the testator; if the remainder predeceases the testator, the interest "lapses."

B. Button Attacked

Critics argue that the Washington court should have held that at the moment the trust was created, the beneficiary took a vested remainder and that "vested" means the remainder beneficiary need not survive the trustor.¹³⁵ The fact that the trustor could revoke the trust gift at any time before his death would merely make the remainder vested subject to defeasance.¹³⁶ Therefore, upon the beneficiary's death (whether before or after the trustor's death), the remainder interest should have descended according to the beneficiary's will or the laws of intestacy.¹³⁷ In response to the *Button* court's reasoning that the revocable living trust remainder interest "is in practical effect a legacy,"¹³⁸ Professor Robert Fletcher exclaimed:

Can the court be serious in saying that an "intervivos trust disposes of property upon the death of the settlor"? An intervivos gift may indeed create an interest, such as a remainder, that comes into enjoyment upon the death of the settlor, but that interest was created intervivos, and no authority holds otherwise.¹³⁹

In contrast to a devise, which has no legal effect until the testator dies, the trust gift cannot lapse because it is vested, albeit defeasibly, from the creation of the trust.¹⁴⁰ As Professor Fletcher contends:

Lapse . . . and the anti-lapse statutes designed to protect against it, are thus consistent with the ambulatory nature of a will and the fact that it

135. See Robert L. Fletcher, *A Critical Note on Lapse*, 8 GONZ. L. REV. 26, 26-27 (1972); see also J.R. Kemper, Annotation, *Anti-Lapse Statute as Applicable to Interest of Beneficiary Under Inter Vivos Trust Who Predeceases Life-Tenant Settlor*, 47 A.L.R.3d 358, 360-61 (1973); Note, *supra* note 126, at 745 (1972).

136. Kemper, *supra* note 135, at 361; Note, *supra* note 126, at 745 (citing *First Nat'l Bank v. Tenney*, 165 Ohio St. 513, 138 N.E.2d 15 (1956)).

137. See Kemper, *supra* note 135, at 360-61 (citing *First Nat'l Bank*, 165 Ohio St. 513, 138 N.E.2d 15). Professor Kemper explains that the court should properly have held:

(1) that under the trust involved, the settlor retained a life estate and his mother—to whom the trust property was to be paid over at his death—took a vested remainder, subject to defeasance in the event that the settlor revoked the trust during his lifetime; (2) that such vested remainder descended to the heirs-at-law of the mother upon her death, subject to the same condition as to defeasance by revocation; and (3) that upon the death of the settlor without having revoked the trust, the remainder interest of the mother's heirs became absolute.

Id.; see also Fletcher, *supra* note 135, at 26-27 (arguing the court erred in asserting that the gift required the donee to survive the donor to come into enjoyment and that the mother's interest should have passed on her death to her successors in interest); Note, *supra* note 126, at 745-46.

138. *Button*, 79 Wash. 2d at 854, 490 P.2d at 734.

139. Fletcher, *supra* note 135, at 31.

140. See Kemper, *supra* note 135, at 363; see also Fletcher, *supra* note 135, at 27, 30 (A trust interest would never lapse in the common-law sense of the term; rather, the interest would revert.). But see *supra* note 40.

does not become operative until the death of the testator, and are seemingly inconsistent with the concept of a transaction in praesenti creating valid existing interests in property in favor of a trustee and a designated beneficiary or beneficiaries, which is fundamental to the establishment of an *intervivos* trust.¹⁴¹

Critics thus argue that, unlike the beneficiary under a will, there is no need for the trust remainder to survive the trustor to take a gift; the interest already exists and is subject only to revocation by the trustor.

C. *Button* Revisited

Essentially, the Washington Supreme Court simply dismissed the entire issue of whether the interest was defeasibly vested or contingent as irrelevant to the question of whether the beneficiary must survive the trustor.¹⁴² Instead, it focused on the functional similarity of wills and revocable living trusts:

[T]he only difference between such a gift [a bequest] and that involved here is that the *inter vivos* trust disposes of property upon the death of the settlor without the necessity of complying with the statute of wills. . . . A gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an *inter vivos* instrument or in a will.¹⁴³

Whereas Professor Fletcher concentrates on the historical metaphysical distinction between the disposition of property via the will versus the trust,¹⁴⁴ the Washington court completely ignored this distinction, and instead, emphasized the practical fact that trustors use revocable living trusts to dispose of property at death. The court cited this fact as the basis of its decision to apply the state antilapse statute to the trust remainder.¹⁴⁵ Thus, the following questions remain: Is the Washington court's reasoning sound and the result desirable; and if so, how can a similar result be achieved in California?

While the Washington court deemed the issue of vesting completely irrelevant to its decision,¹⁴⁶ the California court in *Randall v. Bank of America National Trust & Savings Ass'n*, under a similar set of facts, based its decision solely upon the finding that the gift was vested.¹⁴⁷ The discrepancy most likely results from the fact that "vesting" has been stretched to describe a variety of different situations.¹⁴⁸ One scholar

141. Fletcher, *supra* note 135, at 26; *see also* Note, *supra* note 126, at 744 (arguing that the court in *Button* effectively dissolved the distinction between testamentary and *intervivos* gifts).

142. *Button*, 79 Wash. 2d at 855, 490 P.2d at 734-35.

143. *Id.* at 854, 490 P.2d at 734.

144. *See* Fletcher, *supra* note 135, at 31.

145. *Button*, 79 Wash. 2d at 854, 490 P.2d at 734.

146. *Id.* at 855, 490 P.2d at 734-35.

147. *Randall v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 48 Cal. App. 2d 249, 254-55, 119 P.2d 754, 757 (1941). *See supra* notes 103-112 and accompanying text.

148. Professor Ferrier noted that "[t]he word 'vest' unquestionably merits the Hohfeldian

identified five different uses of the term "vesting."¹⁴⁹ Generally, however, it is agreed that technically,

[a] future interest is *vested* if it meets two requirements: first, that there be no *condition precedent* to the interest's becoming a present estate other than the *natural expiration* of those estates that are prior to it in possession; and second, that it be *theoretically* possible to identify who would get the right to possession if the interest should become a present estate *at any time*.¹⁵⁰

Instead of adopting this technical definition of vesting and then analyzing whether a survival requirement also existed, the California court interpreted vesting to preclude a condition of survival.¹⁵¹

In fact, as the Washington court explained in *Button*, vesting does not necessarily negate a condition of survival;¹⁵² there is no reason that the constructional preference for vesting should prevent the imposition of a condition of survivorship. For example, though the trustor of a revocable living trust may revoke a beneficiary's interest at any time, the remainder is still said to be vested. The power to revoke the trust is merely a condition subsequent to the vesting of the remainder which may completely divest the remainder, thus making the interest vested subject to defeasance.¹⁵³ Similarly, a survivorship condition need not be read only as a condition precedent to vesting, but rather may be read as a condition subsequent to the vesting of the remainder. The condition might read,

epithet 'chameleon-hued,' a characterization which that learned legal writer and scholar evidently reserved for juristic terms of 'convenient and seductive obscurity.' " William W. Ferrier, Jr., *Implied Condition of Survivorship in Gifts of Future Interests in California*, 40 CAL. L. REV. 49, 61 (1952) (citing Professor Wesley N. Hohfeld's description of the term "license" as "chameleon-hued" in *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66, 92 (1917)).

149. Professor Ferrier explains:

In the first place there is the highly technical (sometimes termed, 'feudal') meaning, particularly applicable to remainders which are subject to no condition precedent. Secondly, vested may connote indefeasibly vested, applying to an interest which is not only vested in the first sense but also is not subject to any divesting condition subsequent. In the third place, vest may refer to the vesting in possession or enjoyment rather than in interest or right. Fourth, vested may be used to designate a transmissible interest, that is, one which is not subject to any condition of survival, whether or not it is subject to any other condition precedent. Fifth, vested may refer to a right or interest claimed to be entitled to some particular protection under doctrines of constitutional law.

Id. (citing THOMAS JARMAN, *JARMAN ON WILLS* 1325-30; WALTER B. LEACH, *CASES ON FUTURE INTERESTS* 255-56 (2d ed. 1935); LEWIS M. SIMES, *THE LAW OF FUTURE INTERESTS* § 347 (1936). As to the fifth meaning, see *Spreckles v. Spreckles*, 116 Cal. 339, 48 P. 228 (1897); THOMAS M. COOLEY, *CONSTITUTIONAL LIMITATIONS* 745 (8th ed. 1927)); JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* § 118 (4th ed. 1942).

150. BERGIN & HASKELL, *supra* note 30, at 66-67.

151. See *supra* note 107. This corresponds with Professor Ferrier's fourth definition of vested. See *supra* note 149.

152. *In re Estate of Button*, 79 Wash. 2d 849, 855, 490 P.2d 731, 735 (1971).

153. See BERGIN & HASKELL, *supra* note 30, at 70-71.

"to O for life, then to A if A survives O," (a condition precedent) or "to O for life, then to A; but if A does not survive O then the gift reverts to O" (a condition subsequent).

Read as a condition subsequent, a survivorship condition does not preclude vesting.¹⁵⁴ Even with a survivorship condition, the two vesting requirements are still met: there is no condition precedent to the interest becoming a present estate (other than the natural expiration of those estates that are prior to it in possession), and it is theoretically possible to identify those who would get possession if the interest should become a present estate.¹⁵⁵ If the beneficiary failed to survive the trustor, either the "antilapse" statute would save the interest for the beneficiary's issue or, if the beneficiary had no issue, the interest would revert back to the trustor's estate. Regardless of when the beneficiary dies, "we will always be able to point to a specific living person or to a specific group of living people and say, 'The possession goes there.'"¹⁵⁶ Accordingly, the Washington court was correct in holding that the preference for vesting does not necessarily prevent the court from imposing a condition of survivorship.

Yet, while the Washington court's conclusion that vesting does not preclude conditions is correct, it failed to discuss why the survivorship condition should attach. Without explanation or analysis, the court merely assumed that a beneficiary must survive the trustor or the remainder interest will lapse.¹⁵⁷ The court instead focused on examining why the antilapse statute should save the interest. Much of the criticism of *Button* may arise from the court's failure to acknowledge that it imposed a condition of survivorship on the beneficiary.¹⁵⁸ While technically the interest may fail, the Washington court neglected to explain why and how in fact it did fail. The court applied the antilapse statute without explaining how the gift lapsed in the first place.

It is unclear whether the court knew that it was imposing the survival condition. Citing the Restatement (Second) of Trusts, the court stated that "[i]t was the rule at common law that a gift in trust lapsed upon the death of the beneficiary prior to the death of the trustor."¹⁵⁹ Actually, the Restatement refers only to testamentary trusts.¹⁶⁰ Thus,

154. See SIMES, *supra* note 56, § 11, at 20 ("It should be noted that the existence of a divesting condition does not make a remainder contingent. If the condition is subsequent and not precedent, then the remainder is vested.").

155. See *supra* text accompanying note 150.

156. BERGIN & HASKELL, *supra* note 30, at 67.

157. Fletcher, *supra* note 135, at 26 ("The court's first error was in asserting, without discussion, that the gift required the donee to survive the donor in order to come into enjoyment.").

158. See, e.g., *id.*

159. *In re Estate of Button*, 79 Wash. 2d 849, 853, 490 P.2d 731, 734 (1971) (citing RESTATEMENT (SECOND) OF TRUSTS § 112 cmt. f at 245 (1959)).

160. The Restatement reads:

the court would have been incorrect if it thought that the Restatement expressly imposed a survival condition upon the beneficiaries of living trusts. Later in the decision, when discussing the applicability of the antilapse statute, the court did acknowledge the difference between a testamentary trust and an intervivos trust, but it determined that because the antilapse statute would apply to testamentary trusts and because both living trusts and testamentary trusts dispose of property upon a trustor's death, the statute should apply to both.¹⁶¹ Regardless, the thrust of the opinion is that instruments that perform similar functions should be governed by the same policy considerations.¹⁶² While the Washington court may have skipped a step in its reasoning, its premise that "vesting" does not preclude a survival condition is consistent with the definition of vesting.¹⁶³

As to the wisdom of implying a survival condition, by holding that legislative determinations regarding the probable intent of testators should apply as aptly to trustors, the Washington court addressed the issue realistically. It reasoned that instruments that function similarly should be governed by a uniform policy.¹⁶⁴ In practice, revocable living trusts are widely used as will substitutes,¹⁶⁵ and courts have accepted this practice to the extent that the trust is not used for fraudulent purposes.¹⁶⁶ Far from evolving away from the will, the revocable living trust has steadily assumed more and more will-like characteristics.¹⁶⁷ While the trustor's control over his life interest as well as his power to revoke and modify the trust has increased, the beneficiary's rights have decreased.¹⁶⁸ A trustor may retain the power to revoke or modify the trust.¹⁶⁹ Moreover, the trustor may declare that the predecease of the beneficiary shall operate as a revocation of the trust.¹⁷⁰ It is even acknowledged that, in practice, the power to revoke the trust renders the exercise of the beneficiary's "rights" unfeasible.¹⁷¹ In fact, most courts, as well as the Califor-

[I]f a testator *devise*s property in trust for a person who predeceases him, the *devise* of the beneficial interest lapses, and the person named as trustee ordinarily holds the property upon a resulting trust for the estate of the testator. By statute, however, in many states a *devise* does not lapse under certain circumstances, as for example if the *devisee* leaves a child; and under similar circumstances a *devise* of the beneficial interest under a trust does not lapse.

RESTATEMENT (SECOND) OF TRUSTS § 112 cmt. f at 245 (1959) (emphasis added).

161. *Button*, 79 Wash. 2d at 855, 490 P.2d at 734.

162. *See supra* notes 126-134, 142-143 and accompanying text.

163. *See supra* text accompanying notes 150, 152-156.

164. *Button*, 79 Wash. 2d at 854-55, 490 P.2d at 734.

165. *See supra* notes 12-26 and accompanying text.

166. *Farkas v. Williams*, 3 Ill. App. 248, 121 N.E.2d 600 (1954).

167. *See supra* notes 16-18 and accompanying text; *see also supra* Part II.B.

168. *See supra* notes 100-102 and accompanying text.

169. *See supra* note 33 and accompanying text.

170. 2 SCOTT & FRATCHER, *supra* note 1, at 396.

171. *See supra* notes 98-101 and accompanying text.

nia Legislature, have acknowledged and endorsed the use of revocable living trusts as nonprobate wills by a growing segment of the public.¹⁷²

By implying a condition of survival, the court in *Button* caused remainder interests to behave like expectancies where the beneficiary predeceases the trustor. The court then applied the antilapse statute to the remainder interest just as the statute would apply to a failed expectancy. The court's decision to force the remainder interests of predeceased beneficiaries to "fail" and then extend the antilapse statute to save certain of the failed interests recognizes the similarity between revocable living trusts and wills and the need for consistent distributions.¹⁷³ It determined that the policy promulgated by the state legislature concerning wills was to save only gifts to specific predeceased relatives.¹⁷⁴ Had the court held that in the case of revocable living trusts, gifts to all beneficiaries should be saved, the court would have sacrificed consistency merely to maintain an artificial distinction between the role of wills and revocable living trusts. Extending lapse and antilapse rules to revocable living trusts protects the neglectful trustor who fails to modify her trust upon the early death of a beneficiary just as it protects the neglectful testator who fails to amend her will.

IV. Why and How Should California Follow Washington? A Legislative Proposal to Extend the California Antilapse Statute to Revocable Living Trusts

A fundamental aim of wills and trust legislation is to anticipate and effectuate the intent of the donor.¹⁷⁵ The California Legislature has determined that testators most often desire that gifts remain within the immediate family and generally wish to provide for the deceased beneficiary's issue.¹⁷⁶ Based on this assumption, the legislature promulgated the lapse and antilapse rules, which narrowly control to whom a gift will pass in the event that a devisee predeceases the testator and the testator's will fails to anticipate such an occurrence.¹⁷⁷ Yet, in California, revocable living trusts, which operate like wills, are treated differently.¹⁷⁸ This Part explains why California should follow Washington's example and apply lapse and antilapse rules to revocable living trusts. It asserts that such a change should be affected through legislation and proposes model statutes.

172. See *supra* notes 100-102, 164-166 and accompanying text.

173. See *In re Estate of Button*, 79 Wash. 2d 849, 855, 490 P.2d 731, 734 (1971).

174. *Id.* at 854, 490 P.2d at 734.

175. See *supra* notes 29, 77-78 and accompanying text.

176. See *supra* text accompanying notes 62, 64-74.

177. See *supra* Part I.B.

178. See *supra* Part II.C.

A. Why California Should Follow Washington

The rules of lapse and antilapse should be extended to revocable living trusts in order to effectuate the intent of trustors as well as to achieve consistency and uniformity. No statutory provision exists for the trustor who fails to anticipate the early death of the beneficiary; upon the trustor's death the remainder interest is distributed according to the beneficiary's will (assuming the beneficiary has a will). At best, the deceased beneficiary knew she held an equitable interest and provided for its disposition; this would lead to the property being probated. At worst (and probably more likely), the deceased beneficiary was ignorant of the interest and failed to make a conscious provision for it, unwittingly directing the residue of her estate to a less favored heir. In addition, if the deceased beneficiary has been dead for some time, the gift may be dissipated by the expense of trying to trace to whom it should pass.¹⁷⁹ For instance, if the deceased beneficiary's residual beneficiary is also dead, there may be a chain of interests to trace: "Practitioners will be aware that chains of beneficial interest always end with relatives in Australia."¹⁸⁰

The types of problems created by trust gifts passing according to predeceased beneficiaries' wills are analogous to the problems that ultimately necessitated revision of the first English antilapse statute. Under the old English antilapse provision, gifts to devisees related by blood were saved and passed according to the devisee's will¹⁸¹ (as opposed to the California antilapse statute which passes gifts only to issue regardless of the deceased devisee's will).¹⁸² While gifts to relatives were saved from lapse, the intent of the testator often was thwarted when the gift passed to a stranger named in the deceased devisee's will.¹⁸³ As one

179. As of 1991, the Uniform Probate Code extends lapse and antilapse to will-substitutes. SELECTED STATUTES ON TRUSTS AND ESTATES 135 (John H. Langbein & Lawrence W. Waggoner eds., 1991). The editors explain that the rationale for adopting the provisions "is to prevent cumbersome and costly distributions to and through the estates of deceased beneficiaries of future interests, who may have died long before the distribution date." *Id.* at 139.

180. A.W. Brooke, *Section 33 of the Wills Act 1837: A Reminder*, 125 SOLIC. J. 368, 369 (1981).

181. Wills Act, 1837, 7 Will. 4 & 1 Vict., ch. 26, § 33 (Eng.) As quoted in Brooke, *supra* note 180, at 368, the Wills Act reads:

Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

182. See *supra* note 66 and accompanying text; see also text accompanying notes 67-69.

183. Mr. Brooke provides a humorous illustration of how a bequest could go awry if it passed according to the deceased devisee's will:

When, let us say, a son of a testator dies before the testator leaving an only daughter who survives the testator, then that daughter's existence will save the gift from lapse.

critic of the statute explained, "it would be an irrational family where parents made their own wills so as to carry out the wishes of a child already deceased, irrespective of their own, merely because these had been the wishes of their child."¹⁸⁴ In addition, passing property according to the will of a long since deceased devisee created tracing problems in that if a devisee "died many years ago it is not unlikely that the beneficiaries of his estate will also have died."¹⁸⁵

In response to these problems, Parliament changed the English antilapse statute to specify that the gift pass only to the issue of a blood relative devisee, a class of recipients favored by the majority of testators.¹⁸⁶ Similarly, imposing lapse and antilapse rules on revocable living trusts would better effectuate the intent of the neglectful, forgetful, or ill-advised trustor by more closely controlling to whom the predeceased beneficiary's interest will pass. In addition, passing the remainder interest directly to the predeceased beneficiary's issue prevents it from being probated under the beneficiary's will. And, after all, avoiding probate most likely was the impetus for choosing to create a revocable living trust instead of a will.

In contrast, Professor Robert Fletcher argues that there is no need to apply the antilapse rule to trusts. Professor Fletcher maintains:

[I]n the case of a will, the legislative substitution is made in the belief that the testator's failure to change his will to take into account the legatee's death was due to neglect or oversight, or, perhaps, to illness or to shortness of time between the legatee's death and the testator's death. People are of course expected to keep their wills up-to-date, but knowing that many do not, the legislature has provided substitute takers in these limited circumstances.

Contrast the situation of an *intervivos* gift. . . . [The trustor] makes his disposition all at one time, once and for all, and the interests come into existence the moment he makes the gift. If the donor wants to provide for alternate persons to take in enjoyment upon contingencies that may happen in the future, he may do so . . . but he need not cover every possibility. If he wishes, he may make an incomplete disposition; he thereby retains a reversionary interest.¹⁸⁷

While Professor Fletcher is correct that a trust passes a present interest as opposed to an expectancy, this has little to do with the likelihood that a trustor, like a testator, may fail to anticipate a future event when creating the trust or may neglect to revoke or modify the trust upon the early

The daughter, however, may not necessarily benefit. If the son, by his will, chose to leave his estate to the cats' home, then to the cats' home the legacy will go.

Brooke, *supra* note 180, at 368.

184. *Id.* at 370.

185. *Id.* at 368.

186. Ross Sundberg, *Some Aspects of Testamentary Lapse*, 58 LAW INST. J. 104, 105 (1984).

187. Fletcher, *supra* note 135, at 29-30.

death of a beneficiary. The fact that it is possible to draft a trust that anticipates all contingencies and reflects the trustor's intent does not preclude drafters from failing to provide for such contingencies. Professor Fletcher assumes that the trustor understands all of the ramifications of creating a present interest. The trustor may not want a gift to pass under a deceased beneficiary's will any more than the testator would want a gift to lapse back to the testator's estate. Antilapse statutes are designed specifically to anticipate and correct drafting oversights and thus are equally applicable to revocable living trusts.

The California Legislature has determined to whom the majority of testators would prefer property to pass.¹⁸⁸ This determination should apply equally to the trustor of a revocable living trust. The revocable living trust has evolved into a widely used will substitute—a means for disposing of property at an individual's death.¹⁸⁹ Although Professor Fletcher argues that “[t]he intervivos gift has few of the characteristics of a gift by will [because] [u]nlike a will, it is a present transaction, with nothing tentative or transient about it,”¹⁹⁰ this really only holds true in form, not practice. In practice, the revocable trust interest *is* tentative and transient—very much like a gift by will. The revocable trust beneficiary holds solely at the whim of the trustor and only at the trustor's death is the beneficiary's interest safe from revocation by the trustor.¹⁹¹ Denying that this instrument behaves more like a will than a trust and insisting that similar situations be treated differently in order to create an artificial rift between wills and trusts is unrealistic. Though testamentary formalities and probate courts were once necessary in order to avoid fraud and protect testators, they have become cumbersome, confusing, time consuming, and expensive.¹⁹² Hence, testators have turned to revocable living trusts as a way to circumvent the less desirable aspects of the will.

Originally, trusts were created to avoid “the application of rules of law.”¹⁹³ Courts of equity retained those laws that they deemed reflective of current social policies while refusing to follow laws that had become obsolete.¹⁹⁴ That the revocable living trust has developed into a will substitute is not a problem to be remedied but merely carries on the traditional role of the trust—that of an instrument of law reform. Just as the fifteenth century chancellors valued sound policy over obsolete technicalities, today's legislators should continue to do so by extending the lapse and antilapse rules to revocable living trusts.

188. See *supra* notes 62-69 and accompanying text.

189. See *supra* notes 12-26 and accompanying text.

190. Fletcher, *supra* note 135, at 30.

191. See *supra* text accompanying notes 98-99.

192. See *supra* notes 7-10 and accompanying text.

193. 1 SCOTT & FRATCHER, *supra* note 1, at 6.

194. *Id.* at 7.

B. The Legislative Solution

The Washington court achieved uniformity by implying that a trust interest fails when the beneficiary predeceases the trustor and holding that the state antilapse statute applies to these trust interests.¹⁹⁵ While the imposition of a condition does not necessarily run contrary to the constructional preference favoring early vesting, such a legal reform is more appropriately carried out by the legislature than by the courts. Criticism of *Button* centered not around the result that the Washington Supreme Court reached, but on the liberties the court took in reaching the result.¹⁹⁶ The antilapse statute is a remedial rule that attempts to anticipate intent. Hence, the lawmaking body is best suited to determine the trustor's intent and resolve whether the imposition of an implied condition of survivorship in conjunction with an antilapse-type statute would further this intent.¹⁹⁷ In addition, the current California antilapse statute refers to "devisees" and "testators."¹⁹⁸ These specific references to testamentary instruments would seem to preclude California courts

195. *In re Estate of Button*, 79 Wash. 2d 849, 855, 490 P.2d 731, 734 (1971). *But see* Note, *supra* note 126, at 748-49 (The author contends that applying antilapse leads to inconsistency. Instead of addressing the similarity between wills and revocable living trusts and the corresponding need to attain uniform results between the two instruments, the author argues that antilapse would cause the revocable living trust to yield different results than it has in the past.).

196. For example, Professor Fletcher writes:

With no attention to legislative background, with little or no argument on the point, with no opposite authority, and no dissent, the Washington Supreme Court held in *Button's Estate* that an *inter vivos* gift perfected 26 years before the donor's death "lapsed" when, later, the donee of an indefeasibly vested interest in the property died before the donor died. Then, most remarkable of all, the court held that the antilapse statute was to be used to determine the new owners of the gift previously given 26 years earlier!

Fletcher, *supra* note 135, at 26 (citations omitted).

197. It is the legislature that has the resources to determine the intent of the populace and the authority to codify it. Recent changes in California trust law are

the result of an intensive study, analysis, and revision of trust law by the California Law Revision Commission and its staff over a period of more than three years (the study is part of the major revision of the entire Probate Code that is not yet completed). During this period the Commission submitted the studies, reports, comments, and tentative drafts of proposed statutes to a broad segment of the California Bar for review, comment, and criticism. The tentative, revised, and final drafts of every section of the proposed law were submitted to the Executive Committee of the Estate, Planning, Trust, and Probate Section of the State Bar of California for review and comment. Members and advisors of that committee attended almost every meeting of the Law Revision Commission in which this law was proposed, revised, and approved.

CAL. PROB. CODE §§ 15000-18508 note (CEB 1992) (Development Notes Author's comments on Division 9 of the Probate Code, appearing at the beginning of the division).

198. Section 6147(a) provides, "As used in this section, 'devisee' means a devisee who is kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator." CAL. PROB. CODE § 6147(a) (West 1991) (emphasis added).

from interpreting the antilapse statute as referring to revocable living trust remainders.¹⁹⁹ Thus, instead of calling for the courts to ignore the plain meaning of the lapse and antilapse statutes, which would obscure the scope of the statutes and expose the decision to criticism, the legislature should enact statutes that unequivocally apply to revocable living trusts.

The California Legislature should enact a general requirement that the interest of a remainder beneficiary of a revocable living trust be conditioned upon the beneficiary surviving the trustor. Once the survival condition is established, a savings (antilapse-type)²⁰⁰ statute must be enacted. To obtain maximum uniformity, the statutes should be modelled directly from the California lapse and antilapse provisions.²⁰¹ The "lapse" statute for revocable living trusts might read as follows:

- (a) All revocable living trust remainder interests shall be conditioned upon the beneficiary surviving the trustor or until any future time required by the trust.

199. *But see* Dollar Sav. & Trust Co. v. Turner, 39 Ohio St. 182, 183-84, 529 N.E.2d 1261, 1263 (1988) (holding that the state antilapse statute should apply to revocable living trust remainders despite the fact that the statute employed the specific terms "devise," "testator," and "will" and reasoning that because the revocable living trust is used as a testamentary instrument, public policy against the lapsing of testamentary gifts should apply to the revocable living trust).

200. The term "savings" is used because the statute would only simulate the antilapse rule. "Lapse" denotes only a failed expectancy. A trust remainder would not lapse; rather, the implied condition of survivorship would cause the interest to revert back to the trustor. *See supra* note 40. The implied condition of survivorship merely simulates lapse so that the revocable living trust will behave consistently with a will. Thus, because a revocable living trust remainder technically does not lapse, there also can be no antilapse. For this reason the Note has used the term "savings" to refer to a statute that imitates the antilapse rules by saving certain remainders that would revert due to the survivorship condition.

201. In her article *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, Professor French states that "antilapse statutes generally produce good results when they operate to maintain equality within the family and prevent property from passing outside the family." French, *supra* note 34, at 362. However, she also describes a number of instances in which the current California antilapse statute might not effectuate the testator's intent. *Id.* at 353-63. She asserts that "[l]apse does not always produce intent-defeating distributions, and the relationship of the devisee to the testator is not alone a sufficient basis for discriminating among the situations in which devises should and should not lapse." *Id.* at 373. In order to decrease the instances in which the antilapse statute actually subverts the testator's dispositive plan, Professor French proposes adopting the "probable intent" doctrine

in which the court seeks the disposition the particular testator probably would have wanted by considering any relevant admissible evidence

. . . Under this suggested approach, the statute uses both the identity of the beneficiaries and the nature of the dispositive plan to distinguish the situations in which lapse should be prevented from those in which it should be permitted to occur.

Id. Professor French's proposed antilapse statute would seem to improve upon the current rule as it is more finely tailored toward effectuating the intent of each individual testator. If the California legislature remodels section 6147 on the "probable intent" doctrine, any revocable trust antilapse statute should be rewritten to parallel the changes. *See supra* text accompanying notes 188-189.

- (b) In the absence of a contrary provision in the trust:
 - (1) If it cannot be established by clear and convincing evidence that the beneficiary has survived the trustor, it is deemed that the beneficiary did not survive the trustor.
 - (2) If it cannot be established by clear and convincing evidence that the beneficiary survived until a future time required by the trust, it is deemed that the beneficiary did not survive until the required future time.²⁰²

The savings or "antilapse" statute might read as follows:

- (a) As used in this section, "beneficiary" means a beneficiary who is kindred of the trustor of a revocable living trust or kindred of a surviving, deceased, or former spouse of the trustor of a revocable living trust.
- (b) Subject to subdivision (c), if a beneficiary is treated as if he or she predeceased the trustor, or fails to survive the trustor or until a future time required by the trust, the issue of the deceased beneficiary take in his or her place in the manner provided in Section 240 [intestate succession]. A beneficiary under a class gift is a beneficiary for the purpose of the subdivision unless his or her death occurred before the execution of the trust and that fact was known to the trustor when the trust was executed.
- (c) The issue of a deceased beneficiary does not take in his or her place if the trust expresses a contrary intention or a substitute disposition. A requirement that the initial beneficiary survive for a specified period of time after the death of the trustor constitutes such a contrary intention.²⁰³

V. Conclusion

Just as centuries ago trusts were conceived to circumvent antiquated yet firmly entrenched property laws, revocable living trusts now are being used to accomplish a sort of home-made probate reform. By creating revocable living trusts, trustors are able to "devise" property while avoiding the probate system. Because the main goal of switching from a will to a revocable living trust is to avoid probate, the dispositive intent of the trustor should remain the same as that of the testator. Accordingly, if we accept the premise that the dispositive intents are the same, then we should strive to assure consistent dispositions. If the legislature enacted the lapse and antilapse rules based on the intent of the testator, and if the intent of the testator and the trustor are the same, then lapse and antilapse rules should be applied to revocable living trusts as they are applied to wills.

Although the Washington and Ohio courts have interpreted antilapse statutes to apply to revocable living trust remainders, the decisions have been widely criticized as going beyond the bounds of statutory in-

202. See CAL. PROB. CODE § 6146 (West 1991).

203. See *id.* § 6147.

terpretation. The California courts are unlikely to follow Washington and Ohio and "rewrite" the California lapse and antilapse statutes. Nor should they. Rather, the responsibility rests with the legislature. The California State Legislature already has enacted provisions limiting the rights of revocable living trust remainder beneficiaries, thereby acknowledging that such a remainder interest is more akin to an expectancy than a true equitable interest. This Note proposes that the legislature move a step further and adopt "lapse" and "antilapse" statutes for revocable living trusts comparable to those now applied to wills. Such parallel statutes should help ensure that, in avoiding probate, the trustor does not end up giving away her property to strangers.